

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELBERT HICKS and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, Md.

*Docket No. 95-1448; Submitted on the Record;
Issued January 20, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity beginning November 4, 1990.

Section 8115 of the Federal Employees' Compensation Act,¹ titled "Determination of wage-earning capacity," states in pertinent part:

"In determining compensation for partial disability, ... the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and

¹ 5 U.S.C. § 8115.

(7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition.”

Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such measure.² The Office’s procedure manual provides that a retroactive determination of loss of wage-earning capacity may be made where the Office learns that the claimant has returned to alternative work more than 60 days after the fact, and where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity, and the work stoppage did not occur because of any change in the claimant’s injury-related condition affecting his ability to work.³

In the present case, appellant worked as a mail and file clerk at the Department of the Navy, Naval Air Station, Mayport, Florida from November 4, 1990 until March 25, 1992, when he was placed on leave without pay not to exceed October 9, 1992.⁴ Appellant’s performance of this position for 16 months is persuasive evidence that it represents his wage-earning capacity. There is no evidence that this position was seasonal, temporary, less than full-time, make-shift work designed for appellant’s particular needs, or obtained other than on the open labor market.⁵ There is no evidence that appellant stopped performing this position because of a change in his injury-related condition affecting his ability to work.⁶ The Board therefore finds that the Office, by its September 29, 1994 decision, properly determined appellant’s wage-earning capacity was represented by his actual earnings as a mail and file clerk beginning November 4, 1990.

The Board further finds that the Office properly determined the amount of compensation to which appellant is entitled beginning November 4, 1990.

The formula for determining loss of wage-earning capacity based on actual earnings, initially developed by the Board in the *Shadrick* decision,⁷ has been codified by regulation at 20 C.F.R. § 10.303. Section 10.303(a) of this regulation recognizes the basic premise that an injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages) but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity. Section 10.303(b) of this regulation provides the formula to be utilized by the Office for computing compensation payable for partial disability. First, the Office must determine the employee’s “wage-earning capacity in terms of

² *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (December 1993).

⁴ During this leave-without-pay period, appellant moved to Keflavik, Iceland, where he accepted a position as a substitute teacher beginning September 23, 1992.

⁵ See *Elizabeth E. Campbell*, 37 ECAB 224 (1985).

⁶ See *Mary Jo Colvert*, 45 ECAB 575 (1994).

⁷ *Albert C. Shadrick*, 5 ECAB 376 (1953).

percentage” by dividing his or her earnings by the current, or updated, pay rate for the position held at the time of injury. The Office properly determined this percentage as 56, by dividing his earnings of \$17,365.00 per year (\$333.94 per week) as a mail and file clerk for the Department of the Navy by the updated pay rate for the position of letter carrier he held when injured, \$31,090.00 (\$597.88 per week).

To determine the employee’s “wage-earning capacity in terms of dollars,” the Office then multiplies the “wage-earning capacity in terms of percentage” by the employee’s “monthly pay,” as defined in section 8101(4) of the Act as “the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater.” To determine appellant’s loss of wage-earning capacity, the Office then subtracts the resulting dollar amount from the pay rate for compensation purposes and multiplies this amount by 75 percent for employees with dependents, as provided by sections 8106 and 8110 of the Act,⁸ to arrive at the amount of weekly compensation payable.

The Office properly used appellant’s rate of pay on the date of the injury, as this was the date on which appellant stopped work. There was no recurrence of disability beginning more than six months after appellant resumed regular full-time work. The Office then properly multiplied this pay rate of \$464.86 per week (\$24,173.00 per year) by 56 percent to determine appellant’s “wage-earning capacity in terms of dollars,” and subtracted the resulting amount, \$260.32, from appellant’s pay rate when injured, \$464.86. Appellant’s weekly loss of wage-earning of \$204.54 was multiplied by the 75 percent rate for employees with dependents, resulting in a weekly compensation rate of \$153.41, increased by cost-of-living adjustments to \$202.50, equivalent to a compensation rate of \$810.00 each four weeks. The record reveals no error in the Office’s calculation of appellant’s compensation for loss of wage-earning capacity effective November 4, 1990.

⁸ 5 U.S.C. §§ 8106(a), 8110.

The decision of the Office of Workers' Compensation Programs dated September 29, 1994 is affirmed.

Dated, Washington, D.C.
January 20, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member